

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
December 20, 2005 Session

**STATE OF TENNESSEE v. MATHEW SCOTT PURVIANCE**

**Direct Appeal from the Circuit Court for Montgomery County  
No. 40300451     John H. Gasaway, III, Judge**

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**No. M2005-00151-CCA-R3-CD - Filed March 10, 2006**

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The defendant, Mathew Scott Purviance, was tried and convicted by a Montgomery County jury of two counts of attempted robbery (a Class D felony); two counts of reckless endangerment (a Class A misdemeanor); joyriding (a Class A misdemeanor); and criminal attempt to commit aggravated criminal trespassing (a Class B misdemeanor). He received a total effective sentence of three years and six months, to be served on probation. Additionally, the trial court denied the defendant's request for judicial diversion and imposed fines totaling \$18,000, the maximum for each of the six conviction offenses. On direct appeal to this court, the defendant challenges the denial of judicial diversion; the application of enhancement factor (4) to his convictions for attempted robbery and reckless endangerment; and the trial court's imposition of fines. Upon thorough review, we conclude that the enhancement factor was applied in error and that the trial court failed to articulate its reasoning for the imposed fines and the denial of judicial diversion on the record. Therefore, we modify the defendant's sentences on Counts Two and Three to the presumptive minimums and remand the matter to the trial court for further proceedings consistent with this opinion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed as  
Modified and Remanded for Further Proceedings**

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Patricia A. Rust, Clarksville, Tennessee, for the appellant, Mathew Scott Purviance.

Paul G. Summers, Attorney General and Reporter; Preston Shipp, Assistant Attorney General; John Wesley Carney, Jr., District Attorney General; and Arthur F. Bieber, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

### Facts<sup>1</sup>

The defendant and Chris Lunsford entered the home of the victims, Edward and McKendree Robertson, at night without their permission. After taking several items, Chris Lunsford was discovered and the victims were stabbed before one of them fatally shot Lunsford. Neither victim saw the defendant in their home. The defendant was later found by police walking down a road near the victims' residence with items taken from them.

### Analysis

#### I. Judicial Diversion

The defendant first asserts that the trial court erred in failing to articulate its reasoning in denying judicial diversion. Judicial diversion is the commonly used term describing sentencing pursuant to Tennessee Code Annotated section 40-35-313. Under the statute, qualified defendants may complete a diversion program and receive expungement of the record and dismissal of the charges. On review of a refusal to sentence by Tennessee Code Annotated section 40-35-113, the appellate court must determine if the trial court abused its discretion by the refusal. State v. Cutshaw, 967 S.W.2d 332, 344 (Tenn. Crim. App. 1997); State v. Bonestel, 871 S.W.2d 163, 167 (Tenn. Crim. App. 1993). To find an abuse of discretion, we must determine that no substantial evidence supports the trial court's ruling. Cutshaw, 967 S.W.2d at 344; State v. Parker, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996).

The trial court must consider certain criteria in determining whether an accused should be granted judicial diversion, including: (a) the defendant's amenability to correction; (b) the circumstances of the offense; (c) the defendant's criminal record; (d) the defendant's social history; (e) the defendant's physical and mental health; and (f) the deterrence value to the defendant and others. Cutshaw, 967 S.W.2d at 343-44; Parker, 932 S.W.2d at 958.

On appeal, the defendant contends that the trial court erred in denying judicial diversion summarily, without discussing the applicable factors on the record. The State concedes that the trial court's bare and unsubstantiated finding prevents meaningful appellate review of the issue. We agree. After announcing the defendant's sentences in the present case, the trial court succinctly stated that the defendant's "motion to have [his] cases diverted judicially [was] denied." Therefore, because we are unable to properly review the trial court's reasoning in denying judicial diversion,

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<sup>1</sup> The underlying facts of the case are gleaned from the defendant's brief, the presentence report, and the sentencing hearing transcript. Because a trial court is entitled to consider evidence heard during the trial at sentencing, we would generally require the trial transcript before reviewing a sentencing issue. However, considering the issues presented and that the State concedes same, it was unnecessary for us to review the trial transcript.

we remand the matter back to the trial court for an analysis of the request for diversion, including a discussion of the requisite factors and the reasons for its ruling.

## II. Enhancement Factor

The defendant also contends that the trial court erred in applying enhancement factor (4) to his sentences on Counts Two, Three, Six, and Seven. “When reviewing sentencing issues . . . , the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct.” T.C.A. § 40-35-401(d). “However, the presumption of correctness which accompanies the trial court’s action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

In conducting our review, we must consider the defendant’s potential for rehabilitation, the trial and sentencing hearing evidence, the presentence report, the sentencing principles, sentencing alternative arguments, the nature and character of the offense, the enhancing and mitigating factors, and the defendant’s statements. T.C.A. §§ 40-35-103(5), -210(b); Ashby, 823 S.W.2d at 169. We are to also recognize that the defendant bears “the burden of demonstrating that the sentence is improper.” Ashby, 823 S.W.2d at 169.

The defendant challenges the trial court’s application of enhancement factor (4), that the offense involved more than one victim, to his convictions of two counts of attempted robbery and two counts of reckless endangerment. See T.C.A. § 40-35-114(4). He argues, and the State concedes, that this factor is inapplicable because he was convicted of two counts of both offenses, one for each victim. Indeed, it is well-settled that “there cannot be multiple victims for any one offense . . . committed against a specific, named victim.” See State v. Imfeld, 70 S.W.3d 698, 706 (Tenn. 2002); see also State v. Freeman, 943 S.W.2d 25, 31 (Tenn. Crim. App. 1996); State v. Williamson, 919 S.W.2d 69, 82 (Tenn. Crim. App. 1995). Therefore, we conclude that the trial court erred in applying factor (4) to the defendant’s sentences on Counts Two, Three, Six, and Seven. Accordingly, we modify the sentences on Counts Two and Three (attempted robbery) from three years, six months to the presumptive minimum of two years. The sentences on the remaining counts of reckless endangerment (a Class A misdemeanor) will remain at eleven months, twenty-nine days.

## III. Fine Imposed

In his final issue, the defendant avers that the trial court erred in setting his fine as he did not waive his right to have the jury fix any fine in excess of \$50. Alternatively, he contends that even if he waived the right, the fines were excessive and the trial court failed to state its reasoning in imposing them. The State contends that the defendant effectively waived his right to have the jury set the amount of the fine but concedes that the matter should be remanded for the trial court to explain its reasoning.

We initially note that the record reflects that the defendant and his trial counsel signed a written waiver of his right to have a jury fix any fine in excess of \$50, pursuant to Tennessee Code Annotated section 40-35-301(b). However, as both the defendant and State correctly note, the trial court erred in failing to articulate its reasons for imposing \$18,000 in fines. Not unlike the length and manner of service, fines are to be “based upon the factors provided by the 1989 Sentencing Act, which include ‘the defendant’s ability to pay that fine and other factors of judgment involved in setting the total sentence.’” State v. Lewis, 978 S.W.2d 558, 567 (Tenn. Crim. App. 1997) (quoting State v. Marshall, 870 S.W.2d 532, 542 (Tenn. Crim. App. 1993)). In this case, the trial court imposed the maximum fine on each of six conviction offenses without discussing its reasoning for doing so. Therefore, we remand the issue for reconsideration in light of all sentencing factors.

### Conclusion

We modify the defendant’s sentences in Counts Two and Three to two years and remand the matter for further proceedings consistent with this opinion.

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JOHN EVERETT WILLIAMS, JUDGE